

The Federal Court recognised that parties are at liberty to contract as to how a right can arise and drew a comparison with a contractual term for a demand to be made on a guarantor before a right to sue on the guarantee can accrue. The Said Clause was thus found to be valid. Various preceding Court of Appeal decisions which had ruled to the contrary were distinguished.

Our Ms Yoong Sin Min had assisted the Bank and East Malaysian counsel in the preparation of submissions for the Federal Court hearing in Kuching. She was assisted by Ms Cheah Faan Jin.

*Shencourt Sdn Bhd & Anor v Aseambankers Malaysia Berhad & 3 Ors [2011] MLJU 552)*

As was reported in our earlier issue No. 1/2014, on 27.9.2013, the Court of Appeal had reversed the High Court decision made on 6.5.2009 (the High Court judgment was reported under *Shencourt Sdn Bhd & Anor v Aseambankers Malaysia Berhad & 3 Ors [2011] MLJU 552*). The High Court decision had caused ripples of consternation amongst commercial and investment banks in Malaysia.

In allowing the appeal by the Agent bank and the lenders of a syndicated loan, the Court of Appeal had found, inter alia, that the doctrine of good faith (raised by the Borrower, who had claimed there was a breach thereof and had sued the banks) is a new doctrine still in a state of flux in other legal jurisdictions and had no application in a banker-borrower relationship, especially as such relationship would be governed by fairly detailed agreements.

The Borrower had applied for leave to appeal to the Federal Court and the main question of law proposed by the Borrower in its leave application concerned whether, in Malaysia, the Courts ought to recognise the existence of a duty of good faith in the performance of contractual obligations.

The Federal Court has on January 29, 2014 unanimously dismissed such leave application, as findings of fact by the Court of Appeal would in any event result in the Borrower failing in any appeal to the Federal Court, even if leave to appeal on the aforesaid question of law were to be allowed. Our Ms Yoong Sin Min and Ms Kong Chia Yee represented the banks.

*Public Investment Bank Berhad v Yap Chee Hean [ Court of Appeal Civil Appeal No. W-02(NCC)(W)-2134-09/2013 ]*

In the High Court where this action originated, a customer of the investment bank sued the bank for breach of contract, breach of duty of care and breach of trust arising from unauthorised transactions carried out by the remisier on his share trading account with the bank.

Before the High Court, Yap argued amongst others that the remisier was the bank's agent even in respect of the unauthorised transactions by reason of the terms of the Standard Remisier's Contract and that his failure to notify the bank of any discrepancy or issue with the share trading account did not give rise to estoppel to preclude him from commencing legal action when he was not aware of there being anything wrong in the first place.

Yap's contention that he was not aware of there being anything amiss was premised on the fact that he had changed his correspondence address for all share trading statements to the remisier's residential address so that the remisier would receive all these statements and then report to him on the status of his trades and account. Yap's explanation for agreeing to this arrangement was that he was not conversant in English and was not highly educated and when the remisier offered this service to him, he accepted it as he trusted the remisier implicitly since the remisier was the bank's representative.

After a full trial, the High Court allowed Yap's claim against the bank on the basis of breach of contract as the Court took the view that the remisier was the bank's agent even in respect of the unauthorised transactions and further held that the defence of estoppel did not arise to preclude Yap from now complaining of the unauthorised transactions when Yap was not even aware in the first place of there being anything wrong with the share trading account. The High Court judgment is reported in the law journals under [2014] 8 MLJ 494 and [2014] 2 CLJ 1036.

On appeal by the bank, the Court of Appeal reversed the trial judge's judgment and held that the terms of the Standard Remisier's Contract and the Share Trading Contract between the bank and Yap did not support the trial judge's finding that the remisier was the bank's agent in respect of the unauthorised transactions. Instead, the Court of Appeal was of the view that the said terms clearly showed that the remisier was Yap's agent in respect of the unauthorised transactions.